In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 676

VITO GENOVESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. B) is not officially reported.

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1968. The petition for a writ of

certiorari was filed on October 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court gave appropriate consideration to petitioner's contention, raised on his second motion to vacate sentence challenging the jury instructions, that the instructions, to which no exceptions were taken at trial, lacked clarity.

2. Whether costs were properly taxed against petitioner by the court of appeals.

STATEMENT

Petitioner's 1959 conviction and sentence for conspiracy to violate the narcotics Export-Import Act (21 U.S.C. 173, 174) was affirmed on direct review.[1] On September 14, 1965, petitioner moved to vacate his sentence under 28 U.S.C. 2255 on the grounds that there was insufficient evidence of his knowledge of illegal importation of narcotics and that the instructions failed to present that issue to the jury. The motion was denied by the district court (269 F. Supp. 616), and the court of appeals affirmed (378 F.2d

[1] *Sub nom. United States* v. *Aviles*, 274 F. 2d 179 (C.A. 2), certiorari denied, 362 U.S. 974. A motion for a new trial on the ground of newly discovered evidence was denied, 197 F. Supp. 536 (S.D. N.Y.). Another phase of the case involving alleged failure of the government to produce certain notes was decided against petitioner, 200 F. Supp. 711 (S.D. N.Y.), and affirmed by the court of appeals, 315 F. 2d 186, but was vacated and remanded *sub nom. Evola* v. *United States*, 375 U.S. 32. On remand, the judgment of conviction was again affirmed, 337 F. 2d 552, certiorari denied, 380 U.S. 906.

748). The sole basis for relief stated in petitioner's present motion to vacate sentence was as follows (R. 1201-1202):

> The ground upon which this relief is claimed is that the charge of the trial judge herein did not clearly apprise the jury that each party to the alleged conspiracy must be found to have had knowledge that narcotics were illegally imported. It is not contended that one skilled in the law and logical analysis could not find these requirements at some point in the charge by piecing together and extrapolating various principles propounded; it is contended that there was no clear, simple, unmistakeable exposition of the requirement of individual responsibility brought home to the jury.

The district court denied the motion, finding that it did not differ significantly from the prior motion, that it did not state a basis for collateral relief, and that, in all events, petitioner's contention was refuted on its merits by the record (Pet. App. B). The court of appeals affirmed *per curiam* and assessed costs against petitioner (Pet. App. A).

ARGUMENT

1. Contrary to petitioner's argument, the district court did not deny his present motion solely on the basis of the denial of his prior motion to vacate. The district court fully considered petitioner's contention that the jury instructions were inadequate under the supervening decision of the Tenth Circuit in *Mason* v. *United States*, 383 F. 2d 107 (see Pet. App. A 5). As the court pointed out, the conviction in *Mason* was

reversed on direct appeal on the ground that the instructions did not adequately explain the effect of the statutory presumption of knowledge of illegal importation, while the trial judge in the present case did not give any instruction with respect to the statutory presumption. Insofar as *Mason* holds that guilty knowledge of one defendant may not be imputed to other defendants in a conspiracy case, it is in accord with decisions of the Second Circuit which antedated petitioner's prior motion to vacate. *Hernandez* v. *United States*, 290 F. 2d 86, 90 (C.A. 2); *United States* v. *Bentvena*, 319 F. 2d 916, 949 (C.A. 2), certiorari denied, *sub nom. Ormento* v. *United States*, 375 U.S. 940; *United States* v. *Agueci*, 310 F. 2d 817, 825-826 (C.A. 2), certiorari denied, 372 U.S. 959. In pointing out in detail how the instructions in this case were in accordance with those principles (Pet. App. A 5-A 6) the district court gave more consideration to petitioner's contention than was required, for in addition to petitioner's failure to preserve the contention at trial, error in instructions is not a ground for collateral relief. *Azzone* v. *United States*, 341 F. 2d 417, 419 (C.A. 8), certiorari denied, 381 U.S. 943; *Carrillo* v. *United States*, 332 F. 2d 202 (C.A. 10); *Cambiano* v. *United States*, 295 F. 2d 13, 14 (C.A. 9), certiorari denied, 368 U.S. 999.

2. The court of appeals was authorized to order costs taxed against petitioner under Rule 39(a), (b) of the Rules of Appellate Procedure and 28 U.S.C. (Supp. III) 2412 (Pet. App. A 9-A 11). Contrary to petitioner's suggestion (Pet. 12), a Section 2255 proceeding is not based on a "motion" incident to the

underlying cause of action, but rather is an "independent civil suit" seeking specific relief established by statute. See *Heflin* v. *United States*, 358 U.S. 415, 418 n. 7; compare Rule 35, F.R. Crim. P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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